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To:

Tim Ott, Esq.	Fax # (202) 622-1657
re. comments on your	Fax #
Sept. 11, 2003	Fax #
Interim Regulations	Fax #
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October 14, 2003

Chief of Records
Attn: Request for Comments
Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington DC 20220

Comments of the Center for Constitutional Rights on Interim Final Rules, Department of the Treasury, Office of Foreign Assets Control: "Foreign Assets Control Regulations; Reporting and Procedures Regulations; Cuban Assets Control Regulations: Publication of Revised Civil Penalties Hearing Regulations," 68 Fed. Reg. 53640 (Sept. 11, 2003)

Introduction and Statement of Interest

The Office of Foreign Assets Control ("OFAC") has requested public comment on a set of interim regulations, adding several sections to 31 CFR Part 501, and superseding and removing parts of the Cuban Assets Control Regulations, 31 CFR Part 515 ("CACR"). Under these regulations, OFAC prosecutes civil penalties against Americans who travel to Cuba in alleged violation of the terms of the economic embargo against that nation.

The Center for Constitutional Rights ("CCR" or the "Center") is in a unique position to comment on these particular rules. For many years the Center has represented and advised hundreds of individuals in various stages of the civil penalty process administered by OFAC for alleged violations of the CACR. On several occasions during that time, the Center has delivered testimony critical of the embargo before Congress.

We at the Center for Constitutional Rights continue to believe the embargo is ill advised, immoral and unconstitutional in that it infringes the right of Americans to travel freely and inflicts unnecessary economic hardship on the Cuban people. It also diverts government resources that are urgently needed to fight terrorism. By issuing the instant regulations, OFAC appears poised to start the hearing process in earnest, some 11 years after the Cuban Democracy Act of 1992 mandated hearings for those accused of violations of regulations authorized by the Trading with the Enemy Act. OFAC officials have also indicated repeatedly over the last several months that the appointment of one or two Administrative Law Judges to hold such hearings is imminent. We find it particularly galling that OFAC has chosen this time to divert even more of its resources away from the war on terrorism and put them in the service of this foolishly conceived policy.

COMMENTS

As an initial matter, it is imperative that OFAC produce a new circular, written in lay language, to accompany the notices requiring detailed responses. Such a circular used to accompany Prepenalty Notices ("PPNs"), and while it was printed in exceptionally fine print, many clients did find it useful and learned about their right to a hearing by reading it. Since the

effective date of these new regulations, OFAC has sent PPNs accompanied by a copy of the new regulations themselves. Of course, OFAC should, in the interests of fairness, make the availability of hearings clear within the Penalty Notice itself. This used to be done in the text of PPNs as recently as 1998 (e.g. "Election of Proceedings: 1. Within 30 days of the mailing of this Notice, you may request an agency hearing"), however, in recent years the PPN has merely made reference to the attached circular (e.g. "Please note that you have 30 days, as set out in the attached document, to respond to this notice.").

Moreover, since the issuance of these regulations, OFAC has continued to issue Prepenalty Notices based on pre-9/11/03 templates, using the same language quoted above to indicate that the respondent has only 30 days, not 60, to respond to the PPN. Although the new regulations of September 11, 2003 are enclosed with these PPNs, many respondents we have spoken to are confused by the inconsistency and believe they must respond to the PPN within 30 days. We therefore request that OFAC cease issuing new PPNs and Penalty Notices until such time as either (1) a new form for PPNs and Penalty Notices is created, indicating clearly the rights and obligations of the respondent within the text of the form, or (2) a new circular, explaining these rights and obligations clearly in lay language, is produced to accompany these notices.

501.705: Service and Filing

In our opinion, regular first class mail is an inadequate mode of service for any of the notices issued in the course of the civil penalties process. We presume that OFAC will continue its current practice of mailing Prepenalty Notices and Penalty Notices via certified mail with return receipts to verify delivery, and we hope that it will extend this practice to Requirements to Furnish Information, which are generally sent out via regular mail.

Service upon the last known address of respondents has proved inadequate in many cases where a respondent had moved between the date of their reentry through Customs and the (often much later) date when OFAC sent an initial RFI or PPN. In many such cases we have seen, the respondent never receives any of the notices, resulting in default penalties. At a bare minimum, we feel OFAC should ensure that individuals are informed in writing *upon their interview with Customs agents* of their obligation to update their address with OFAC on an ongoing basis. Another possible solution to the problem would be for OFAC to mandate that if the initial notice (whether RFI or PPN) is not sent by OFAC to the address given by respondent upon reentry within one year (the usual mail forwarding period of the U.S. Postal Service) of reentry, civil penalties prosecution will be waived. Neither of these measures would impose a substantial burden on OFAC.

501.706(b)(3): Right to Request a Hearing

It is not entirely clear from the text of the new regulations how OFAC will treat requests for hearings made in response to a PPN. Our reading of the instant regulations is that a request for an administrative hearing made in response to a PPN will not be acknowledged until after the issuance of a Penalty Notice, but will still serve as a valid hearing request in the event that a respondent fails to make a timely hearing request in response to a Penalty Notice. ("The Director will not *consider* any request for an administrative hearing until a Penalty notice has been issued," § 501.706(b)(3), implies that the hearing request will remain pending until after the

Penalty Notice is issued, at which time the Director will consider it.) We believe that many individuals, and indeed many attorneys, may be confused by the recycling of the "Prepenalty Notice" and "Penalty Notice" nomenclature from the pre-9/11/03 regulatory regime, and will continue to believe that the PPN response is the proper time to request a hearing.

501.707: Response to Prepenalty Notice

According to this section, the Prepenalty Notice response must "admit or deny specifically each separate allegation of violation" made in the PPN and that "[a]ny allegation not specifically addressed in the response shall be deemed admitted." This section also demands that the response "set forth any ... new matter or arguments ... in support of all defenses or claims of mitigation." Leaving aside the question of enforceability and constitutionality of these provisions, it is absurd to ask respondents to delineate intended defenses and mitigation claims without first obtaining discovery from the agency. The requested responses to the Penalty Notice and Order Instituting Proceedings (pursuant to new §§ 501.711, 501.714) are problematic for the same reason.

Subsection (b)(1)(iv) demands that financial hardship disclosure be made at the Prepenalty Notice stage. It is unclear what consideration will be given to financial hardship that manifests itself after the Prepenalty Notice response. Also, we note that the new regulations provide, at § 501.740(a)(ii), that the ALJ may allow the respondent "opportunity to assert his or her inability to pay a penalty, or financial hardship," by filing a financial disclosure statement at that stage of the proceedings.

501.723: Prehearing Disclosures and Discovery

The new interim regulations indicate that the provisions from 501.710 to 501.761 are intended to be retroactive, including the new provisions regarding discovery. It is our position that OFAC's deadlines for all discovery requests pending as of Sept. 11, 2003 are still applicable. In particular, former § 515.710(c) indicated that interrogatories must be served within 20 days of a request for a hearing, and that parties had 30 calendar days to respond. OFAC's responses to the approximately 140 interrogatory requests submitted on behalf of CCR clients with their hearing requests are all long overdue, and nothing in the discovery provisions of the new regulations affects this fact.

501.714: Answer to Order Instituting Proceedings

Because the answer to the Order Instituting Proceedings ("OIP") must be filed with the Administrative Law Judge, and because the contents of such response as required by regulation may be reduced by the ALJ at his or her discretion (*see* subsection 501.714(b)), we trust that no OIP will be issued before an administrative law judge has been named and successfully appointed by OFAC.

501.715: Notice of Hearing

Subsection (b) of this section, regarding the "[t]ime and place of hearing," does not mention the possibility of telephonic hearings. Travel is the biggest expense of attending a

hearing for both respondents and their counsel, and making the availability of a telephonic hearing explicit would alleviate the fear of this unnecessary expense and allow respondents freely to take advantage of the hearing rights that Congress intended they have. (We note that ALJs have the power, pursuant to 5 U.S.C. § 556(c)(5), to "regulate the course of the hearing" which has been interpreted by the courts to grant ALJs wide latitude over the manner of conducting the proceeding.)

501.723: Prehearing Disclosures

This section requires both parties to automatically (without waiting for a request) disclose the name and contact information of "each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses...." This seems to say that such names must be disclosed regardless of whether the party intends to use the information. This may be problematic for respondents who, e.g., may have visited numerous persons in Cuba who did not witness any spending transactions. These witnesses may have information relevant to defenses, but respondent may have no intent to call them as witnesses. Does "*will use* to support its claims or defenses" or "*intends to use*" more accurately capture OFAC's intent with this regulation?

501.726-727: Motions

The new interim regulations indicate that the provisions from 501.710 to 501.761 are intended to be retroactive, including the provisions regarding discovery. Again, it is our position that our approximately 140 pending motions to dismiss the civil penalties proceedings, submitted along with hearing requests for clients, are still governed by former 515.709(d)(2), which stated that OFAC's failure to respond to a properly-served motion was to be deemed consent to such motion.

CONCLUSION

We would like to reiterate once again our unequivocal opposition to the Cuban embargo on moral, public policy and constitutional grounds, and to the use of OFAC enforcement resources in pursuit of CACR violations, which is damaging to the national security of the United States. OFAC's ever-increasing commitment to appoint as many as two Administrative Law Judges (with their attendant support staff) will further drain resources away from its significant counterterrorism duties. We look forward to OFAC's response.

Respectfully submitted,

Shayana Kadidal, Esq.
CENTER FOR CONSTITUTIONAL RIGHTS